IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 76-91**

SOUND SHIP BUILDING CORPORATION,

*Petitioner,*

*—against—*

BETHLEHEM STEEL CORPORATION,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

DICKINSON R. DEBEVOISE,
744 Broad Street,
Newark, New Jersey 07102,
*Attorney for Respondent.*

*Of Counsel:*

RIKER, DANZIG, SCHERER & DEBEVOISE,
C. H. BARNETTE,
DAVID M. BECKWITH.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

## TABLE OF CONTENTS



### Cases Cited

**Statutes Cited**



**Rules Cited**



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-91**

SOUND SHIP BUILDING CORPORATION,

*Petitioner,*

*—against—*

BETHLEHEM STEEL CORPORATION,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in *Sound Ship Building Corporation* v. *Bethlehem Steel Corporation,* No. 75,1337 (3d Cir. 1976). For the reasons which follow, it is respectfully submitted that the Petition should be denied.

## Counter-Statement of Questions Presented

1. Should the petition for certiorari to the Court of Appeals be granted when none of the reasons for granting certiorari set forth in Supreme Court Rule 19(1)(b) are present and the petition merely seeks a review of determinations of the Court of Appeals and District Court that there is no genuine issue as to any material fact, and said determinations are not "clearly erroneous"?

2. Should the petition for certiorari be granted when the Court of Appeals was correct in finding that petitioner failed to develop a theory or to set out any facts in the depositions and documents showing a causal link between Respondent's acts and Petitioner's losses?

3. Should the petition for certiorari be granted when the District Court was correct in holding a restrictive covenant for a limited period of time contained in a deed to real estate is not a per se violation of §1 of the Sherman Act?

4. Should the petition for certiorari be granted when the District Court was correct in holding that there was no evidence to support Petitioner's claim that the restrictive covenant in the deed from Respondent to the purchaser of its shipyard either resulted in monopoly power or an unreasonable restraint of competition?

## Counter-Statement of the Case

Petitioner ("Sound Ship") instituted suit in January, 1973, against Respondent ("Bethlehem"), alleging (i) that in 1964 Bethlehem sold a Staten Island property, known as "Mariner's Harbor", and imposed upon the Grantee (JML) a deed covenant limiting the property's use as a



shipyard for 20 years, and (ii) that the enforcement of this covenant in 1971, when Sound Ship attempted to lease the shipyard property from JML, violated both Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 2 of the Sherman Act, 15 U.S.C. §2 (Complaint, Ja 6a-14a)*.

After extensive discovery, Sound Ship voluntarily abandoned its claim that Bethlehem had been guilty of an attempt to monopolize or monopolization under Section 2 of the Sherman Act, and the case proceeded solely on the Section 1 charge.**

In 1974 Bethlehem moved in the District Court for summary judgment and Sound Ship cross-moved for summary judgment. At least in 1974, Sound Ship as well as Bethlehem had concluded that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," showed that there was "no genuine issue as to any material fact" and that it was "entitled to a judgment as a matter of law" (Rule 56(c), Fed. R. Civ. P.).

---

* This Brief will refer to the record below as follows:

Joint Appendix—"Ja"; Sound Ship's Supplemental Appendix—"Sa"; Bethlehem's Supplemental Appendix—"Ba"; Appendix accompanying Sound Ship's Petition for Writ of Certiorari—"Pet. App."

** Bethlehem never denied the existence of the covenant and it does not contest Sound Ship's interpretation of the covenant. As hereinafter recited in more detail, discovery established that Bethlehem entered into negotiation with JML and Sound Ship to strike a reasonable price for the release of the covenant, but that, unbeknownst to Bethlehem, Sound Ship secretly abandoned the negotiations and instead entered into a lease for another site while continuing a charade of negotiations with JML and Bethlehem.

After hearing oral arguments, the District Court denied Sound Ship's motion and granted Bethlehem's motion for summary judgment, holding that the Bethlehem covenant "when measured by traditional reasonableness standards is not violative of the law." (District Court Opinion Pet. App. A12-A20).

Sound Ship appealed to the United States Court of Appeals for the Third Circuit. After oral arguments and in affirming the District Court, the Court of Appeals held that "Sound Ship has failed to develop a theory or to set out any facts in the depositions and other documents that have been filed which would show a causal link between Bethlehem's acts and Sound Ship's losses" (Court of Appeals Opinion Pet. App. A8).

Sound Ship petitioned the Court of Appeals for rehearing. The petition was granted and the Court of Appeals gave the parties leave to file briefs addressed to the question: "Is there evidence in the record sufficient to show a causal relationship between the restrictive covenant imposed by Bethlehem and the losses suffered by Sound Ship?" (Court of Appeals Memorandum Opinion Pet. App. A2).

Sound Ship and Bethlehem filed detailed briefs which reviewed the evidence bearing upon the question of causation. Ruling upon Sound Ship's petition, the Court of Appeals stated, "We have reread the record carefully, but do not find it to support the assertions made by Sound Ship in its petition for rehearing . . . [O]ur review reveals the same factual pattern we noted originally, and it leads us to the same result: Sound Ship did not articulate in the depositions and other documents any causal nexus between Bethlehem's acts and Sound Ship's losses." (Court of Appeals Memorandum Opinion Pet. App. A3).

The Court of Appeals denied Sound Ship's petition for rehearing. Sound Ship's Petition for a Writ of Certiorari followed.



## REASONS FOR DENYING THE WRIT

### I. Sound Ship's Petition for a Writ of Certiorari is not supported by any of the reasons set forth in Supreme Court Rule 19(1)(b).

Without the inflammatory words, without trying to be a clairvoyant as petitioner has done in interpreting everyone's intent, and stripping Sound Ship's Petition to its essentials, the Petition is simply asking this Court to sift the record to determine if there is an issue of fact which would require reversal of the judgment of the District Court, affirmed by the Court of Appeals, granting Bethlehem's and denying Sound Ship's motion for summary judgment.

The ultimate issue presented to this Court is the very issue presented to the District Court and to the Court of Appeals, namely, was there an absence of a genuine issue as to any material fact and, if so, whether on the basis of the undisputed facts, Bethlehem was entitled to judgment as a matter of law?

After completion of discovery, each party concluded that the matter was an appropriate one for summary judgment. Each party, therefore, moved for summary judgment in its favor, although now that Sound Ship has lost its motion, it seeks to persuade the Court to accept a different view of the case.

Applying the standards of reasonableness to the restrictive covenant and Bethlehem's actions, the District Court ruled that "The facts of this case are undisputed and the law is clear in its determination that the Mariner's Harbor covenant is not violative of §1 of the Sherman Act." (District Court's Opinion Pet. App. A20).

Passing upon the issue of causation, the Court of Appeals stated that "Because Sound Ship has failed to show, by affidavit or otherwise, that the required causal link exists between the alleged antitrust transgression and damage to Sound Ship, and because there are no disputed material facts, summary judgment was an appropriate method of disposing of the case." (Court of Appeals Opinion Pet. App. A8).

Sound Ship seeks to come within Rule 19(1)(b) by suggesting that the decision of the Court of Appeals is in conflict with applicable decisions of this Court. This contention is patently incorrect. The decision of the Court of Appeals relied upon a rule of law long recognized by this Court, namely, that a plaintiff may recover in an antitrust case only if he can establish a causal connection between the defendant's acts and the plaintiff's injuries, citing *Virtue* v. *Creamery Package Mfg. Co.*, 227 U.S. 8, 24-25 (1913); *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100 114m. 9 (1969) (Court of Appeals Opinion Pet. App. A8).*

Sound Ship attempted and again attempts to misrepresent the Third Circuit's opinion by attributing to it the rule that Sound Ship "in order to meet the causal nexus test, first should have paid the tribute demanded by Bethlehem for release of an illegal covenant" (Petition for Writ of Certiorari at pp. 13, 14). As the Court of Appears stated, "That rule was neither embraced nor implied in our opinion." (Court of Appeals Memorandum Opinion Pet. App. A3).

---

* Other Circuit Courts of Appeals are reaching the same conclusion, e.g., *Southern Concrete Co.* v. *United States Steel Corp.*, 535 F.2d 313 (5th Cir. 1976).



The Court of Appeals did not decide that Sound Ship *was required* to lease the site subject to the deed covenant on Bethlehem's terms in order to establish causation. The Court simply observed *if* Sound Ship had leased that site "it conceivably could have shown that the acts by Bethlehem which it claims are illegal had caused it damage". The Court then added "[t]hat situation, however, is not before us." (Court of Appeals Opinion Pet. App. A9). What the Court of Appeals did hold was that there was a complete absence of any proof that the existence of the covenant had any effect upon rentals charged for shipyards anywhere in the New York Harbor area and, moreover, the rental for the former Bethlehem shipyard plus the cost of obtaining a release of the restrictive covenant was in the aggregate substantially less than the rental for which Sound Ship was able to lease a shipyard in the open market which was not subject to a restrictive covenant.*

Sound Ship also suggests, in an attempt to come within Rule 19(1)(b), that the decision of the District Court that a deed covenant limiting use of real estate for a limited period of time is not a per se violation of the Sher-

---

* The evidence is clear that: (1) Sound Ship's total billings increased dramatically from the date the covenant became effective in 1964 until Sound Ship was ejected from College Point (Ja 223a-225a); Staten Island, where Mariner's Harbor is located, was the last place Sound Ship wanted to be when it started looking for another site, but Sound Ship settled for Mariner's Harbor when all non-Staten Island sites proved too expensive (Ja 201a-202a) (see footnote on page 10 for further detail); (3) the restrictive covenant has not and could not have had any influence on the rentals of any other sites; (4) Sound Ship turned its back on negotiations with Bethlehem and leased a property much more expensive than the proposed payments to JML for rent and to Bethlehem for the release. (See further detailed discussion on pages 18 and 19 herein.)

man Act is erroneous and constitutes an important question of federal law which should be settled by this Court (Petition for Writ of Certiorari p. 23).

That question would not be reached at all unless the determination of the Court of Appeals on the issue of causation were set aside. As discussed in Point III hereof, it is respectfully suggested that in any event the rule of law applied by the District Court is proper and well-settled.

Thus none of the criteria for granting review on certiorari set forth in Supreme Court Rule 19(1)(b) prevail. If it grants Sound Ship's Petition, this Court will be required to conduct an examination of the evidence to determine if there is a genuine issue as to any material fact and then to apply well recognized principles of law. The significance of the issues presented are limited to the parties to this action.

## II. There was no evidence to show a causal link between any conduct on Bethlehem's part and any injuries alleged to have been suffered by Sound Ship.

Sound Ship's Petition for Rehearing submitted to the Court of Appeals and its Petition for Writ of Certiorari filed in this Court derive their legal arguments from two factual propositions which are demonstrably incorrect and which cannot be supported by the record.

First, Sound Ship asserted that Bethlehem's proposal that the covenant be released in full for a payment of $250,000 caused it to lease the Hoboken site. A careful study of the testimony of Sound Ship's two principals establishes that, unbeknownst to Bethlehem, Sound Ship



had already leased the Hoboken site long *before* Bethlehem first advanced its proposal to release the covenant for annual payments aggregating $250,000. This fact had not been brought to the attention of the Court of Appeals until after it had rendered its initial opinion. It was not necessary for the Court to discuss that fact in its Memorandum denying Sound Ship's petition for rehearing, because even on the basis of Sound Ship's incorrect assertions, causation had not been established.

Second, Sound Ship also asserted that Bethlehem demanded $250,000 in full in advance for release of the covenant. As found by the Court of Appeals, this contention cannot be supported by the record. Bethlehem's judgment contemplated that the $250,000 be paid in annual installments during the remaining life of the covenant.

The testimony of both Bethlehem's and Sound Ship's officers and other witnesses and the documents clearly demonstrate that:

In 1964 Bethlehem sold its Staten Island shipyard known as Mariner's Harbor to JML Trading Corp. ("JML"). The deed included a covenant that JML would not permit the premises to be used for certain shipyard purposes for a 20 year period (Ja 110a). Bethlehem continued to engage in ship repair, reconditioning, conversion and servicing of ocean-going vessels at its nearby Hoboken shipyard (Ja 67a; 110a-111a). During that time and until 1971, Bethlehem's Shipbuilding Division was unaware of the existence of Sound Ship (Ja 42a).

Sound Ship was engaged almost exclusively in the construction and repair of non-self-propelled harbor craft (Ja 123a, 171a). Its 20 year lease was scheduled to expire in September 1971 and in 1968 it commenced an extensive search for new quarters (Exh. D-6, Ja 220a-221a; Ja 122a, 137a). All the sites it was shown were rejected

as unsatisfactory, either because they were inherently unsuitable for Sound Ship's purposes or because Sound Ship found their costs to be beyond its financial means.*

In the spring of 1971 the Staten Island property came to Sound Ship's attention and Sound Ship expressed an interest in leasing the property from the owner, JML (Ja 180a). Thereafter JML's agent requested Bethlehem to release the remaining 13 years of the covenant (Ja 152a-153a).

Initially Bethlehem declined to negotiate a release of the covenant. All of the correspondence and memoranda

---

* Sound Ship asserts that of all the shipyard sites in the New York harbor area, Bethlehem's former Staten Island shipyard was the "only . . . site particularly suited to Sound Ship's needs" (Petition for Writ of Certiorari at p. 3). The testimony of Sound Ship's principals establishes that Sound Ship found other waterfront property suitable for its purposes. One was available on a five year lease (JA 140a); another was available but required the expenditure of upwards of $50,000 to dredge (JA 141a); still another was available but would have involved purchasing more than Sound Ship needed for itself and the leasing or sale of the balance (JA 144a-145a). In these and other instances the significant deterrent to the purchase or lease of suitable property was Sound Ship's very tight financial position (JA 143a).

The prices which Sound Ship was offered for the many sites it examined in the New York harbor area were for sites which could be used for shipyard purposes. The price which Sound Ship was offered for the former Bethlehem site was for a site which, when the price was offered, could *not* be used for shipyard purposes. When Bethlehem sold that site to JML in 1964, the price it received was negotiated in the context that the purchaser and its lessees could not use it for shipyard purposes for 20 years (Ja 40a-41a). As the Court of Appeals noted, Sound Ship agreed to pay substantially more in rental and other costs for the Hoboken site than it would have had to have paid in the aggregate for the former Bethlehem shipyard as rent and for the release of the covenant (Pet. App. A6-A7).



which Sound Ship cites at pages 4 to 6 of its Petition for Writ of Certiorari relate to Bethlehem's initial decision not to negotiate a release. Shortly after making its initial decision, however, Bethlehem reversed itself and in September offered to enter into a partial release of the covenant to permit Sound Ship to perform all business activities it had engaged in at its previous place of business. The price which Bethlehem suggested for the partial release was $130,000 payable in installments of $10,000 per year for the duration of the covenant (Ja 190a-194a; 65a-66a).

When this offer was communicated to him, Sound Ship's President, Mr. Roche, concluded that he was not going to pay anything (Ba 262a-263a) and, unbeknownst to Bethlehem, he immediately entered into negotiations with the Penn Central Railroad trustees for a lease of premises in Hoboken. Mr. Roche instructed the other Sound Ship principal, Mr. Starr, to "keep on talking" with JML and Bethlehem while he conducted his negotiations for the Hoboken site (Ba 259a-260a).

In October 1971, Sound Ship and the Penn Central Railroad trustees reached agreement and on November 5, 1971 a lease was signed (Ba 260a; Lease constituting appendix to Sound Ship's Reply to Bethlehem's Brief in opposition to Petition for Rehearing). Notwithstanding that fact, Mr. Starr followed his instructions to "keep on talking" with JML and Bethlehem, and JML and Bethlehem continued the negotiations, not knowing that Sound Ship had already leased premises elsewhere.

Sound Ship did not mention in its Petition for Rehearing submitted to the Court of Appeals and it does not mention in its Petition for a Writ of Certiorari that Sound Ship's own testimony and documents establish that Sound Ship reached agreement to lease the Hoboken site

in *October* 1971 (Ba 260a) and signed a lease dated *November 5,* 1971. That was two months before *January* 1972 when Bethlehem first offered to release the entire covenant for $250,000 payable in annual installments.

In its Petition for a Writ of Certiorari (at the bottom of page 8), Sound Ship perpetuates the illusion that it leased the Hoboken site in response to Bethlehem's $250,000 proposal by reciting the fact that Sound Ship entered into the Hoboken lease out of proper chronological order. Had Sound Ship wished to inform the Court of the correct sequence of events, it would have described the execution of the Hoboken lease on page 7 of its Petition immediately after describing Bethlehem's $130,000 proposal, because it was immediately after that proposal was made that Sound Ship entered into the Hoboken lease.

Sound Ship's entire argument extending from page 13 through page 19 of its Brief is directed to a state of facts which, by its own testimony and documents, did not exist. Sound Ship's every hypothesis and argument rests upon the proposition that it entered into the Hoboken lease in response to the onerousness of Bethlehem's $250,000 proposal. In fact, Sound Ship had entered into the Hoboken lease more than two months before the $250,000 proposal was even broached.

During the period after October 1971 when, unbeknownst to Bethlehem, Sound Ship had agreed upon the terms of the Hoboken lease, JML concluded that a partial release of the covenant involved too many complications and prevailed upon Bethlehem to offer to release the entire covenant for $250,000 payable in annual installments over the remaining life of the covenant (Ja 69a-72a). This offer was communicated to Sound Ship in January, 1972, but



Sound Ship never responded to Bethlehem (Exh. P-15; Ja 262a; Exh. P-16, Ja 264a; Ja 105a-106a).

In its Petition for Rehearing before the Court of Appeals and in its Petition for Certiorari, Sound Ship asserts that Bethlehem was not willing to accept $250,000 over the remaining years of the covenant but wanted this sum *up front, in advance,* thus making it impossible for Sound Ship to meet the offer. As the Court of Appeals stated in its Memorandum Opinion denying the petition for rehearing, "The record nowhere contradicts the statement made in our opinion that Bethlehem offered 'to lift all restrictions [on the Mariner's Harbor property] for a price of $250,000, to be paid over the remaining thirteen years that the covenant would otherwise have been effective.'" (Pet. App. A43). Of course, although Bethlehem did not know it in January, 1972 when it offered to release the entire covenant, Sound Ship was no longer free to accept any proposal made by JML or Bethlehem because two months before it had signed the lease committing itself to the Hoboken site, which also explains why Sound Ship did not respond to Bethlehem's January offer.

The rent and other expenses which Sound Ship was obligated to pay under the lease of the Hoboken site were far greater than the sums it would have paid for the former Bethlehem shipyard under either offer made by Bethlehem. Sound Ship entered into the Hoboken lease on its own initiative and, in fact, concealed this move from Bethlehem. Subsequently Sound Ship went out of business and filed this action against Bethlehem.

The Court of Appeals correctly stated, "Nor do we find any factual material set forth in the depositions or other documents in the record indicating that the price of Hoboken property or of waterfront land utilizable as a shipyard generally was affected by the restrictive cove-

nant, or that Bethlehem in any way induced Sound Ship to lease the site in Hoboken." (Pet. App. A3).

Thus the Court of Appeals concluded that there was no evidence of any causal nexus between Bethlehem's acts and Sound Ship's losses.

## III. The District Court correctly held that absent evidence of monopoly power or an unreasonable restraint of competition, a restrictive deed covenant for a limited period of time is not a per se violation of §1 of the Sherman Act.

If the basis for the judgment of the Court of Appeals were rejected by this Court, Bethlehem would nevertheless be entitled to summary judgment for the reasons stated by the District Court. The District Court reviewed the covenant and the undisputed evidence in the case and concluded that neither the covenant nor Bethlehem's actions violated §1 of the Sherman Act.

The District Court first rejected Sound Ship's contention that the mere inclusion of the covenant in the deed conveying the shipyard was a per se violation of the antitrust laws.

It has long been the rule that covenants not to compete or not to use property in competition with a business retained by a seller which are "merely ancillary to a lawful contract" are lawful unless they are so unreasonable as to violate the antitrust laws, *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). This rule as expressed in the *Addyston* case has been followed to the present day, e.g., *Goldberg* v. *Tri-States Theatre Corp.*, 126 F.2d 26 (8th Cir. 1942); *Orbo Theatre Corporation* v. *Loew's Incorporated*, 156



F. Supp. 770 (D.C. Cir. 1957), *aff'd*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959); *Tri-Continental Fin. Corp.* v. *Tropical M. Enterprises*, 265 F.2d 619 (5th Cir. 1959); *Syntex Laboratories, Inc.* v. *Norwich Pharmacal Co.*, 315 F. Supp. 45 (S.D. N.Y. 1970); *aff'd*, 437 F.2d 566 (2d Cir. 1971); *Bradford* v. *New York Times, Co.*, 501 F.2d 51 (2d Cir. 1974).

The cases upon which Sound Ship relies in no way invalidate the ancillary restraint doctrine as originally set forth in the *Addyston* case, as reiterated in countless cases since *Addyston* and as applied by the District Court. The cases cited by Sound Ship do no more than apply the per se rule to those well defined activities which this Court has long held constitute a per se violation of the Sherman Act.

Bethlehem's execution and delivery of the deed containing the 20 year covenant and JML's acceptance of it clearly did not constitute a per se violation of the Sherman Act.

## IV. There was no evidence that the deed covenant and Bethlehem's actions constituted an unreasonable restraint of competition or resulted in monopoly power.

Sound Ship's suggestion (see its Question "3" at p. 2 of its Petition for Writ of Certiorari) that the District Court adopted "a rule that any covenant by a purchaser restricting the use of real property is reasonable *per se* if it is obtained in connection with the sale of restricted property, regardless of its anticompetitive purpose or effect" is incorrect and unfair to the District Court. The District Court carefully reviewed the record to determine if there were any evidence which would support a finding

that the covenant involved an impermissible restraint upon competition.

Similarly unfair is Sound Ship's attempt to denigrate the District Court's decision by referring to the expression of surprise by a Bethlehem executive that the restriction could be enforced (Sound Ship's Petition for Writ of Certiorari, pp. 27, 28). As Sound Ship is well aware, the "surprise" did not arise because of the restriction upon shipyard use. It arose because of the Bethlehem employee's erroneous belief that the restriction was unlimited in duration instead of what was in fact correct, that the restriction was only for 20 years (Ja 48a).

The District Court found that there was no genuine dispute as to any material fact and, applying the standard of reasonableness, that "in light of the evidence and factual circumstances surrounding the Mariner's Harbor deed, the covenant is not unreasonable within the meaning of §1 of the Sherman Act." (Pet. App. A17).*

---

* Sound Ship criticizes the District Court for finding that the deed covenant was not an expression by Bethlehem of an intent to eliminate Sound Ship as a competitor, stating, "We do not contend that Bethlehem intended in 1964 to eliminate Sound Ship as a specifically designated target from the relevant market . . ." (Sound Ship's Petition for Writ of Certiorari, p. 30). Sound Ship may not be making that contention now. It was certainly making it before the District Court in connection with the cross-motions for summary judgment.

Another unfair use of the District Court's opinion appears in line 4 on page 10 of Sound Ship's Petition for Writ of Certiorari. There Sound Ship represents that the District Court stated, ". . . although the *covenant in question* would be unreasonable on its face standing alone . . ." What the District Court really stated was, "Standing alone, a 20 year restrictive covenant is unreasonable. . .". It is only a matter of plain reading that the District Court held that the Bethlehem covenant was valid, reasonable and legal and was contrasting the Bethlehem covenant and circumstances with a totally different situation not before the Court.



Among the facts which were undisputed and which support the determination of the District Court are the following:

For many years Sound Ship engaged in the business of constructing and repairing non-self-propelled barges (Ja 123a, 171a, 212a, 223a-255a), and Bethlehem engaged in, among other things, the construction and repair of ocean-going vessels (Ja 67a, 110a-111a). Although both enterprises conducted their businesses in the New York Harbor, Bethlehem's shipyard personnel were unaware even of Sound Ship's existence until 1971 when the discussions of the release of the covenant took place (Ja 42a).

Approximately eleven firms engage in the repair of barges in the New York Harbor area (Ja 216a-219a), and approximately four firms engage in the construction of barges in that area (Roche dep. Transcript, pp. 420-422). For the most part these are smaller concerns whose lower overhead makes it possible to conduct their businesses profitably (Ja 126a-127a; Starr dep. Transcript pp. 297-298).

During the 1960's there was a continuing and drastic decline in the business of Bethlehem's New York shipyards, and as a result it disposed of three of these yards, retaining only its Hoboken, New Jersey facility (Williams dep. Transcript pp. 198-200; Langaker dep. Transcript pp. 85-87). The Mariner's Harbor premises were sold to JML in August, 1964, and the deed contained the covenant precluding certain shipyard activity for a period of 20-years.

Sound Ship makes no claim that its business was injured in any way by the existence of the covenant and in fact its own records show that its total billings increased dramatically during the period from 1964 until 1971 when its lease expired (Ja 223a-225a).

There is nothing in the evidence to suggest that in 1964 there were not numerous sites available in the New York Harbor area for shipyard purposes. Sound Ship's statement (at p. 29 of its Petition for Writ of Certiorari) that in 1971 "all sites other than the Mariner's Harbor location were *effectively functionally unavailable to Sound Ship*" can only mean that, through no fault of Bethlehem, Sound Ship did not have the financial resources to pay for the normal adaption of the premises available to it.

In 1968 Sound Ship commenced an extensive search for a new site at which it could carry on its business when its lease expired in 1971 (Ja 122a, 137a). Sound Ship was shown numerous sites, all of which it rejected for various reasons: they were either too expensive or unsuitable or too difficult to adapt to Sound Ship's needs (Ja 142a-146a; 178a-179a).

The fact of the matter was that New York Harbor real estate was expensive (Ja 213a). The significant deterrent to Sound Ship's purchase or lease of suitable property was Sound Ship's very tight financial position (Ja 143a). Sites which were advantageous, or which could have been adapted to Sound Ship's needs, were rejected by reason of their cost (Ja 140a; 141a 144a-145a).

As the Court of Appeals found, there was no evidence in the record "indicating that the price of the Hoboken property or of waterfront land utilizable as a shipyard generally was affected by the restrictive covenant . . ." (Pet. App. A3). The rent which JML was able to quote Sound Ship for a lease of the Mariner's Harbor site was a rent requested by a landlord which had bargained and paid for property which could not be used for general shipyard purposes for 20 years at the time of the purchase of the property and for 13 years at the time the lease was discussed.



Sound Ship first learned of the Staten Island shipyard in the spring of 1971 and entered into the negotiations for a lease and for a release of the covenant described above (Ja 180a; 226a-227a). Sound Ship's negotiations for a release of the covenant were a sham because, as noted above, immediately after Bethlehem made its first offer for a release of the covenant, Sound Ship entered into negotiations for a lease of the Hoboken shipyard and concluded a lease in early November 1971. Sound Ship agreed to pay substantially more to lease the Hoboken site than it would have paid both as rent and for the release of the covenant had it leased the former Bethlehem shipyard.

As found by the Court of Appeals, there is no evidence "that Bethlehem in any fashion induced Sound Ship to lease the site in Hoboken," (Pet. App. A9), or "that the price of the Hoboken property . . . was affected by the restrictive covenant" (Pet. App. A3), or "that the owner of the Hoboken site even knew of the restrictive covenant covering the Mariner's Harbor site when it leased the property to Sound Ship" (Pet. App. A4).

Thus the finding of the District Court that the deed covenant and Bethlehem's actions did not constitute an unreasonable restraint on competition or result in monopoly power was based upon facts as to which there was no material dispute.

## CONCLUSION

**For these reasons, it is respectfully submitted that review by the Court would be inappropriate and the Petition for a Writ of Certiorari should be denied.**

Respectfully submitted,

DICKINSON R. DEBEVOISE,
744 Broad Street,
Newark, New Jersey 07102,
*Attorney for Respondent,*
*Bethlehem Steel Corp.*

*Of Counsel:*

RIKER, DANZIG, SCHERER & DEBEVOISE,
C. H. BARNETTE,
DAVID M. BECKWITH.

Dated: August 19, 1976